Antitrust and Federal Regulation Alert: Federal Trade Commission Picks Intel As Target for Separate Section 5 Claim Beyond the Sherman Act

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After a lengthy investigation, on December 16, 2009, the Federal Trade Commission (FTC) filed an administrative complaint against Intel Corporation (Intel) alleging that it has engaged in anticompetitive and unfair conduct in order to maintain a superior position in several markets. The FTC action is particularly notable because the Commission is attempting to invoke authority under Section 5 of the Federal Trade Commission Act (FTC Act) recognized by the Supreme Court in 1972 to pursue arguably anticompetitive conduct that does not violate the Sherman Act. Only time will tell how successful the Section 5 revival will be, but companies should be aware of the FTC's current willingness to exercise its full authority under the broader Section 5 and reach conduct that the Sherman Act would permit.

The Complaint

In the complaint, the FTC alleges a host of anticompetitive conduct as unfair methods of competition in violation of Section 5 of the FTC Act. The FTC alleges that when its monopoly was threatened, Intel resorted to "unfair methods of competition and unfair practices to block or slow the adoption of competitive products and maintain its monopoly to the detriment of consumers." Examples of the alleged conduct (which date back to 1999) include:

- Entering into anticompetitive arrangements with the largest computer manufacturers that were designed to limit or foreclose various original equipment manufacturers' (OEMs) use of competitors' products
- Punishing OEMs who did not purchase "enough" of Intel's products by threatening to increase (and actually increasing) prices, ending product and technology collaborations, shutting off supply, and reducing marketing support, while favoring OEMs that purchased all or nearly all of their requirements from Intel
- Offering market share or volume discounts to selective OEMs in an attempt to foreclose competition in the relevant central processing unit (CPU) markets
- Using its position in complementary markets to protect against competitive threats in the relevant CPU markets
- Inducing suppliers of complementary software and hardware products to eliminate or limit their support of non-Intel CPU products
- Failing to disclose material information to consumers about the effects of Intel's redesigned software on the performance of non-Intel CPUs
- Pressuring independent software vendors to label their products as compatible with Intel products only, even though competing microprocessor products were compatible as well.

Section 5

Most significant here is the fact that the FTC has alleged stand-alone claims that Intel violated Section 5 of the FTC Act—*i.e.*, the complaint alleges that Intel's acts violate Section 5 as unfair methods of competition independent of the narrower and more settled boundaries of the other antitrust laws. Section 5 of the FTC Act is broad and extends beyond the scope of the antitrust laws—it prohibits unfair or deceptive acts or practices whether or not those acts or practices arise to unfair methods of competition. Conduct that is prohibited by the Sherman Act, Clayton Act, and

Robinson-Patman Act would also violate Section 5 of the FTC Act. However in *FTC v. Sperry & Hutchinson Co.,* 405 U.S. 233 (1972), the Supreme Court held that Section 5 cut more broadly than the Sherman Act. The FTC has not attempted to assert and utilize this authority, but has been content to ground its antitrust enforcement and jurisprudence in the Sherman Act.

According to the statement of FTC Chairman Leibowitz and Commissioner Rosch, "[d]espite the long history of Section 5, until recently the Commission has not pursued free-standing unfair method of competition claims outside of the most well-accepted areas, partly because the antitrust laws themselves have in the past proved flexible and capable of reaching most anticompetitive conduct." In fact, the FTC has not successfully brought such a free-standing claim since the late 1970s. For over two decades now, the FTC has not tried to use Section 5 in any meaningful way after several cases in the early 1980s failed—courts often held that the FTC was imposing its own business judgment on the market.

Other Actions Against Intel

The FTC action follows upon other competition actions against Intel. In May 2009, the European Union (EU) fined Intel 1.06 billion euros for abusing its dominance in the computer chip market. The fine, roughly equivalent to $1.45 billion, was the largest ever for any breach of competition law in the EU. The conduct at issue in that proceeding is similar to the current U.S. action. For example, the EU found that Intel made payments to manufacturers in exchange for postponing, cancelling, or restricting the introduction or distribution of non-Intel products. Furthermore, Intel made payments to big box stores to sell only Intel-based computers in some countries. The EU ordered Intel to stop offering rebates that were conditioned on OEMs buying less (or none) of a rival's product. That conduct, according to the EU, allowed Intel to maintain a share of at least 70% of the chip sales market from October 2002 through December 2007. Intel is currently appealing the EU fine.

In 2005, Advanced Micro Devices (AMD) sued Intel in the U.S. District Court in Delaware alleging that Intel coerced major computer manufacturers, through large payments, into using Intel products (and thus not using AMD chips). The suit also involved intellectual property cross-licensing disputes. In November 2009, the parties reached a settlement in which Intel agreed to pay $1.25 billion to settle the antitrust claims. Intel also agreed to a set of business practices.

Conclusion

Given the statement of FTC Chairman Leibowitz and Commissioner Rosch that "it is more important than ever that the Commission actively consider whether it may be appropriate to exercise its full Congressional authority under Section 5," it is likely that this is the first in a series of stand-alone Section 5 cases. If the FTC is successful, it will mean a new era of increased and expanded enforcement (as promised by the Obama administration earlier this year). The FTC is "fully committed to a speedy resolution of this action" and expects a trial to begin in nine months and a decision to be made in 20 months. Despite the *Sperry* precedent, the courts' views as to how much broader Section 5 is than the Sherman Act is very, very unclear.

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